15

FILED

OCT 19 1945

CHARLES ELMORE CROPLEY
CLERK

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 539

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,

vs.

SECOND NATIONAL BANK AND TRUST COMPANY
of Saginaw, Michigan, individually and as Trustee
under the Ninth and Tenth Paragraphs of the Will
of Arthur D. Eddy, Deceased,
Respondent and Plaintiff Below

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

WILLIAM ALFRED LICKING,
Attorney for Petitioner,
1607 Ford Building,
Detroit 26, Michigan.

Johnston Reid & Ruland Co., Law Bldg., 607 East Fort St., W., Detroit 26, Mich.

SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1-12
Questions of Public Interest	2
Summary Outline of Facts	2-8
Reasons Relied on for Allowance of Writ	8-12
Brief in Support of Petition for Writ of Certiorari	13-39
I. Opinion of Sixth Circuit Court of Appeals	13
II. Jurisdiction	14
III. Specification of Errors	14
IV. Brief Statement of Facts and Issues	14-21
V. Argument on law	22-34
Point I. "Costs" do not include Counsel fees in a fraud action	22-23
Point II. The Mandates of the Court of Appeals Expressly Limit Counsel Fees on Appeal to the Usual $20 Taxable Fee	23-25
Point III. The Trustee commenced this litigation—and the burden of proof to justify admitted losses was always upon it, under the Michigan Rule of Davidson v. Young, 290 Mich. 266	25
Point IV. The Trustee's Accounting judgment of February 7, 1939 was not res adjudicata	26
Point V. The District Court's Findings on counsel and auditors' fees	26-28
Point VI. Opinion of Circuit Court of Appeals	28-33
Point VII. Conclusion of Brief	33-34

Page

Certificate of Counsel..... 34

Appendix A 35-39

TABLE OF CASES

American Trust Co. v. Speers, 60 Fed. (2d) 994, 997 28

Davidson v. Young, 290 Mich. 266.....4, 18, 29, 31, 36

Flanders v. Tweed, 15 Wall. 450..... 23

Grant v. Fletcher, 283 Fed. 243 Syl. 21 and 22..... 10, 22

Kansas R. R. Co. v. Trust Co., 281 U. S. 1, Syl. 1 and 8.....6, 8, 9, 23

Missouri Ry. Co. v. Larabee, 234 U. S. 459, 468.... 7, 9

Oelrichs v. Spain, 15 Wall. 211..... 23

Simmons Co. v. Grier Co., 258 U. S. 82, 89..... 26, 28

Sprague v. Ticonic Bank, 307 U. S. 161..... 23, 24

Title 28 U.S.C.A. Sec. 344..... 14

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No..... .....

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY
of Saginaw, Michigan, individually and as Trustee
under the Ninth and Tenth Paragraphs of the Will
of Arthur D. Eddy, Deceased,
Respondent and Plaintiff Below

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To: The Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

QUESTIONS OF PUBLIC INTEREST

(a) Has the District Court power to award extraordinary counsel fees ($5000) against Petitioner Cleveland —for two briefs filed by Respondent Trustee opposing applications for Writs of Certiorari?

(b) Has the District Court power to award extraordinary counsel fees ($10,000) against Petitioner Cleveland—for briefs (and oral arguments) filed by Respondent Trustee, as appellee, on two appeals in the Circuit Court of Appeals—

when in each appeal the Mandate of the Appellate Court only allowed to Respondent Trustee a counsel fee of $20?

(c) Are such counsel fees on appeal of $15,000 punitive and unreasonable?

(d) Are such counsel fees on appeal against public policy—as, in effect, fines imposed to prevent or discourage any appeals or reviews of District Court judgments—which defeated parties believe in good faith they should take to this Supreme Court?

SUMMARY OUTLINE OF FACTS

I. District Court Judgment of December 13, 1938.

Awarded to Respondent Trustee its "costs" to be taxed. Affirmed on appeal (117 Fed. (2d) 938). Court of Appeals' Mandate allowed Respondent Trustee $20 as counsel fee.

II. District Court Judgment of February 7, 1939.

Awarded "Disbursements" and "Accounts of its Auditors and counsel" to be filed and approved—

and expressly provided that no other counsel fees shall be taxed "by plaintiff" Trustee Respondent (R. 258).

Affirmed on appeal (117 Fed. (2d) 1009) Court of Appeals' Mandate allowed Respondent Trustee $20 as counsel fee.

III. District Court Judgment of November 30, 1943.

Awarded Respondent Trustee $39,000 of counsel fees—as follows:

(a) $12,000 under the District Court judgment of December 13, 1938, awarding Trustee taxable "costs."

(b) $12,000 under the District Court judgment of February 7, 1939—awarding Trustee only its expenses to date of that judgment—

and expressly forbidding any other or additional counsel fee allowance against Petitioner and in favor of Trustee (R. 258).

(c) $10,000 on appeal ($5000 in each case) although the affirmance Mandates only allowed Respondent Trustee $20 as counsel fees in each case.

(d) $5000 to Respondent Trustee for briefs in this Supreme Court—opposing the two applications for certiorari.

IV. Testamentary Accounting Judgment of February 7, 1939.

(a) Respondent Trustee Bank, as Testamentary Trustee, sued petitioner Cleveland, a one-sixth residuary legatee, asking exoneration for admitted losses of $125,000 in petitioner's legacy.

(b) Petitioner Cleveland, as a defendant, asked Trustee to justify the admitted losses—only on corporate stock losses in years of 1925 to 1930—and waived the admitted losses on bonds, lands and accounts receivable.

(c) This justification petitioner was entitled to under the Michigan Law, See

Davidson v. Young, 290 Mich. 266.

(d) The District Court, Hon. Arthur J. Tuttle presiding, held by judgment of February 7, 1939 that petitioner Cleveland had sustained no losses chargeable to respondent Trustee Bank.

This judgment was affirmed on February 14, 1941 (117 Fed. (2d) 1009) without opinion by the Sixth Circuit Court of Appeals.

(e) The judgment of February 7, 1939, allowed Trustee Bank to file

> "a report of its disbursements in the above matter * * * and upon approval thereof by this (District) Court * * * that the same be paid * * *" (R. 256, 258).

(f) Upon affirmance of this District Court Judgment of February 7, 1939, by the Court of Appeals (117 Fed. (2d) 1009) a mandate was issued allowing respondent Trustee

a counsel fee of $20, as allowed by the Rules of the Appellate Court of Appeals.

(g) Now, the Counsel Fee Judgment of the District Court of November 30, 1943 (here appealed from) actually allowed Trustee's counsel fees at $19,500 as follows:

(1) $12,000 for services in the District Court—in a suit brought by Trustee—admitting heavy losses in petitioner's one-sixth residuary interest—and

(2) $5000.00 on appeal in the Court of Appeals—for writing Trustee's briefs for that appellate court --notwithstanding the Court of Appeals' mandate had only allowed Trustee the usual $20 by rule counsel fee—and

(3) $2500.00 on the petitioner's application for writ of certiorari in this Supreme Court, which was denied.

V. Petitioner Cleveland's Mother's Fraud Action Judgment of December 13, 1938.

(a) Trustee Bank had made petitioner Cleveland's Mother a party defendant in its Testamentary Trustee's accounting suit resulting in the above mentioned judgment of February 7, 1939—since the Mother was a life tenant.

(b) The Mother's Administrator, Howell Van Auken, discovered that Trustee's Testator, Arthur D. Eddy had grossly defrauded the mother in her life time (Mr. Eddy was her brother) out of about $750,000. The Administrator filed an answer and cross-bill for damages for the fraud, against the Trustee.

(c) Petitioner Cleveland was not interested in the administrator's claim—and took nothing of any recovery.

(d) District Judge Tuttle dismissed the Administrator's fraud action (see 117 Fed. (2d) 938) and for some reason of his own determined to punish the mother's daughter, petitioner Cleveland, by doubling the foregoing assessments of Trustee's counsel fees against petitioner Cleveland, and actually by the judgment of November 30, 1943 (now appealed from) allowed the respondent Trustee—out of petitioner Cleveland's one-sixth residuary legacy—the following additional sums, namely:

(1) $12,000 for Trustee's counsel fees in the District Court on the Doebler (mother) Administrator's fraud action, and

(2) $5000 on appeal of the mother's administrator in the Court of Appeals — notwithstanding that Court's mandate of affirmance only allowed Trustee Bank the usual counsel fee of $20.00 (which is controlling—See 281 U. S. 1. Syl. 8).

(3) $2500 on the administrator's application for certiorari in the Supreme Court of the United States—for Trustee's brief in opposition to the writ.

This Doebler Administrator's claim for damages against the Arthur Eddy Estate was overruled by the District Court of Appeal's judgment of December 13, 1938, affirmed without opinion by the Court of Appeals on February 14, 1941, in cause No. 8336, 117 Fed. (2d) 938.

This separate judgment allowed the Trustee Plantiff Bank "costs." R. 100, First Appeal case.

It is the law of the United States Courts that "costs" in a Lower Court Judgment do not include or justify allowances for extraordinary counsel fees,—see

Kansas R. R. v. Trust Company, 281 U. S. 1, Syl. 4.

Notwithstanding this Rule and the further rule that extraordinary counsel fees are not allowed on appeal in the Federal Courts of Appeal or this Supreme Court of the United States—

See *Missouri Ry. Co. v. Larabee,* 234 U. S. 459, 468.

(1) A total of $10,000 of counsel fees was allowed for preparation of Trustee's briefs in the Sixth Circuit Court of Appeals—and

(2) A total of $5000 for Trustee's two briefs opposing certiorari in this Supreme Court—all of which $15,000 was assessed against petitioner Cleveland by the District Court Judgment of November 30, 1943, here sought to be reviewed by application for writ of certiorari.

VI. Conclusion of Summary Outline—

The District Court's Judgment of February 7, 1939, (Cause No. 8366) did allow Trustee Bank—in the testamentary Trustee's accounting action—to file

> "a report of its disbursements in the above matter * * * and upon approval thereof by this Court * * * that the same be paid * * *" (R. 256, 258).

This judgment of February 7, 1939, was affirmed without opinion by the Court of Appeals on February 14, 1941 (117 Fed. (2d) 1009)—ten days after it was argued and submitted—and on the very expiration date of ten days allowed appellant Cleveland to file supplemental brief.

This District Court Judgment of February 7, 1939, did not purport or pretend to include extraordinary counsel fees on appeal against appellant Cleveland, to "persuade" her not to appeal to the Court of Appeals.

Had the District Court's Judgment of February 7, 1939 warned petitioner and appellant Cleveland that she would be, in effect, fined—by the District Judge—a total of $15,000 to pay for the writing of appellee Trustee's briefs on the two appeals to the Court of Appeals and in this Supreme Court on certiorari applications—

she could at least have asked permission to appeal (by preliminary motion to the Court of Appeals) and thus possibly have avoided incurring any such unheard of liability.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. A Judgment for "Costs" in a fraud action (party against party) does not permit the District Court to tax extraordinary attorneys fees.

Kansas R. R. v. Trust Company, 281 U. S. 1, Syl. 4.

II. The District Court—after affirmance by the Circuit Court of Appeals—

which by its Mandates allowed the Appellee Bank Trustee, in each of two cases, the usual taxable attorney's fee of $20.00—

cannot thereafter tax against the Appellant, the Trustee Appellee's claimed counsel fees of $10,000, for preparing briefs and arguing the two causes on appeal in the Court of Appeals.

III. The District Court could not alter or vary the mandates of the Appellate Court allowing counsel fees of $20 on each appeal.

See *Kansas R. R. v. Trust Company, supra,* Syl. 8.

IV. The District Court, after affirmance in the Circuit Court of Appeals, has no power to allow the Appellee Trustee counsel fees in this Supreme Court of the United States—

of $5000 for preparing briefs in opposition to the Doebler Administrator's and the petitioner Cleveland's applications for writs of certiorari—which were denied—

Missouri Pac. Ry. Co. v. Larabee, 234 U. S. 459, 468.

V. A judgment for "costs" against a residuary remainderman (not an heir of the testator) cannot be made the basis for assessing a Testamentary Trustee's attorneys fees incurred in defending an heir's (Doebler) administrator's equity suit for claimed fraud committed by the testator in his lifetime.

In other words—a defendant remainderman (not an heir) whose one-sixth share of the residue under the will would have been decreased if the heir's (mother) suit for fraud was sustained—was held liable by the District Court's counsel fee judgment of November 30, 1943, here appealed from—

for all the testamentary trustee's counsel fees expended in defending the suit for fraud brought by the mother's administrator—

and although the efforts of the Trustee benefited not only petitioner Cleveland's one-sixth interest in the estate,

but also two other legatees' (the Charitable Trust and the testator's widow) five-sixths interests in the estate.

VI. Petitioner Cleveland was not properly liable for all the Trustee's counsel fees in the fraud action—for

(a) she did not prosecute the fraud suit, (b) a recovery would not have benefited her but would have reduced her legacy, and (c) the fraud suit was strictly a party against party action, and is not one where counsel fees could be allowed to either party as was so held in

Grant v. Fletcher, 283 Fed. 243, Syl. 21 and 22—

Opinion by Hon. Arthur J. Tuttle, District Judge who entered the judgment of November 30, 1943, here appealed from.

VII. The Judgment of February 7, 1939, of the District Court (upon a Testamentary Trustee's bill to justify losses in the Trust corpus) which provided that the Appellee (Respondent here) Trustee

> "file with this Court a report of its disbursements in the above matter, together with statement of accounts of its auditors and counsel, and upon approval thereof by this Court * * *"

was not a *final judgment*, until the amount of the fees had been fixed by the District Court—after affirmance on appeal.

The allowance of counsel fees in the judgment of February 7, 1939, *was interlocutory and not a final judgment* —and until the amount of the fees had been approved by the judgment of November 30, 1943 (here appealed from) all questions of *whether* any counsel fees at all should be allowed, and if so—*how much* were all open to full review by the Circuit Court of Appeals on this appeal from the

fee judgment of November 30, 1943, here sought to be reviewed by application for writ of certiorari.

VIII. The District Court Judgment of November 30, 1943, affirmed May 22, 1945, rehearing denied July 23, 1945, was excessive and unreasonable and the allowances of Trustee's claimed counsel fees exceeded the fair, reasonable value and worth of the services and work rendered and performed, by the following amounts, namely:

(a) In the District Court by at least the sum of $14,000,

(b) In the Circuit Court of Appeals by at least the sum of $7500,

(c) And in this Supreme Court by at least the sum of $3500.

Wherefore, Your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its Docket,

No. 9802

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY, of Saginaw, Michigan, individually, and as Trustee under the Ninth and Tenth Paragraphs of the Will of Arthur D. Eddy, Deceased,
Respondent and Plaintiff Below

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United

States; and that the Judgment of May 22nd, 1945—rehearing denied without opinion July 23, 1945, therein of said United States Circuit Court of Appeals for the Sixth Circuit be reviewed by this Court and for such other and further relief as this Court may deem proper.

WILLIAM ALFRED LUCKING,
Attorney for Petitioner for Writ of Certiorari.